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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Appellant,

v.

MIGUEL ANGEL CHI,

Defendant and Respondent.

2d Crim. No. B283968  
(Super. Ct. No. 2017008363)  
(Ventura County)

The People appeal the trial court's order dismissing the charges against Miguel Angel Chi for felony identity theft under Penal Code section 530.5, subdivision (a).<sup>1</sup> The court determined that Chi's use of stolen credit cards to purchase store merchandise worth less than \$950 could be charged only as misdemeanor shoplifting under section 459.5, subdivision (a). The People argue that section 459.5, which was enacted as part of Proposition 47 (§ 1170.18), does not apply to section 530.5

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<sup>1</sup> All statutory references are to the Penal Code.

identity theft offenses, and that the cases relied upon by the trial court do not permit dismissal of a charged violation of section 530.5, subdivision (a). We recently rejected this argument in *People v. Jimenez* (May 8, 2018, B283858) \_ Cal.App.5th \_ [2018 Cal.App. LEXIS 410] (*Jimenez*). For the reasons set forth in that opinion, we conclude the court correctly dismissed the identity theft charges (counts 1-3) pursuant to Proposition 47. Accordingly, we affirm.

### FACTS AND PROCEDURAL HISTORY

On three occasions, Chi went into a commercial establishment during normal business hours and fraudulently used another person's credit cards to make purchases valued at \$950 or less. Specifically, Chi used the cards to purchase \$251.55 worth of merchandise from Kohl's, \$578 worth of merchandise from Home Depot, and some beverages from Stagecoach Liquor Store. The People charged Chi with three felony violations of section 530.5, subdivision (a) -- the unauthorized use of the personal identifying information of another -- and one misdemeanor count of receiving stolen property (§ 496, subd. (a)).

At the preliminary hearing, the magistrate declined to hold Chi to answer for the three identity theft counts. Relying upon *People v. Gonzales* (2017) 2 Cal.5th 858 (*Gonzales*) and *People v. Garrett* (2016) 248 Cal.App.4th 82 (*Garrett*), the magistrate concluded that Chi's use of the credit cards was analogous to the fraudulent use of a check, and that the identity theft violations "under the case law as it stands . . . are not eligible to be charged as [section] 530.5 felonies." The magistrate reasoned: "A check is personal information of a person. It's being used. You have an amount. And it seems to me [from] reading

these cases that the amount involved is probably more the crux of their concerns as to why this law is what it is.”

The People rejected the magistrate’s invitation to reduce the charges to misdemeanor shoplifting under section 459.5. Instead, they filed an information which included the three felony identity theft counts. Chi moved to set aside the information pursuant to section 995. He contended that *Gonzales* and *Garrett* stand for the proposition that when a person commits shoplifting under section 459.5, as interpreted by our Supreme Court, the People cannot use the identity theft statute to circumvent the statute’s plain language.

The trial court granted Chi’s motion over the People’s objection. It agreed with the magistrate that *Gonzales* applies. The court explained that “[t]he reason [*Gonzales*] applies, the amount is less than \$950 and [the] facts [are] similar to *Garrett*.”

The People filed a petition for writ of mandate and requested a stay. We summarily denied the petition.

Chi subsequently pled guilty to the charge of receiving stolen property, and was placed on conditional revocable release with 180 days in jail.<sup>2</sup> The People appeal the order dismissing counts 1 through 3.

## DISCUSSION

### *Proposition 47*

California voters enacted Proposition 47 in 2014. (*Jimenez, supra*, \_ Cal.App.5th at p. \_ [2018 Cal.App. LEXIS 410 at p. \*4].) It “reduced certain theft-related offenses from felonies or wobblers to misdemeanors, unless the offenses were committed by certain ineligible offenders.” (*Ibid.*)

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<sup>2</sup> The jail sentence was deemed served.

“Proposition 47 added several new provisions, including section 459.5, which created the crime of shoplifting.” (*Jimenez, supra*, \_ Cal.App.5th at p. \_ [2018 Cal.App. LEXIS 410 at p. \*5].) Section 459.5, subdivision (a) provides: “Notwithstanding [s]ection 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary.” “Section 459.5, subdivision (b) expressly limits charging [on] shoplifting: “Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.”” (*Jimenez*, at p. \_ [2018 Cal.App. LEXIS 410 at pp. \*5-6]; see *Gonzales, supra*, 2 Cal.5th at p. 863.)

*No Error in Dismissing the Identity Theft Counts*

The People contend Chi is not eligible to have counts 1 through 3 dismissed because his offenses constitute identity theft (§ 530.5, subd. (a)), which remains a felony under Proposition 47. We disagree.

In *Jimenez*, the defendant entered a commercial check-cashing business and cashed two stolen checks valued at less than \$950 each. (*Jimenez, supra*, \_ Cal.App.5th at p. \_ [2018 Cal.App. LEXIS 410 at p. \*2].) The People charged Jimenez with two counts of felony identity theft. (§ 530.5, subd. (a).) After a jury convicted Jimenez of both charges, he moved to reduce the convictions to misdemeanors. (*Jimenez*, at p. \_ [pp. \*2-3].) The

trial court granted the motion, and the People appealed. (*Id.* at p. \_ [pp. \*3-4].)

We affirmed the trial court's order. Relying upon *Gonzales, Garrett* and *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*), we concluded that "Jimenez met his burden of establishing that his convictions qualified under Proposition 47 as misdemeanor shoplifting offenses." (*Jimenez, supra*, \_ Cal.App.5th at p. \_ [2018 Cal.App. LEXIS 410 at p. \*15].)

First, we analyzed *Garrett*, which addressed the interplay between felony identity theft (§ 530.5) and section 459.5. (*Jimenez, supra*, \_ Cal.App.5th at p. \_ [2018 Cal.App. LEXIS 410 at pp. \*6-7].) The defendant in *Garrett* entered a store and attempted to purchase gift cards with a stolen credit card. (*Garrett, supra*, 248 Cal.App.4th at p. 84.) After Garrett pled no contest to commercial burglary, he petitioned for resentencing under Proposition 47. (*Garrett*, at p. 86.) The trial court denied the petition, but the Court of Appeal reversed, rejecting the Attorney General's argument that because Garrett intended to commit felony identity theft, the shoplifting statute did not apply. (*Id.* at pp. 86-90.) The court explained: "[E]ven assuming [Garrett] intended to commit felony identity theft, he could not have been charged with burglary under . . . section 459 if the same act -- entering a store with the intent to purchase merchandise with a stolen credit card -- also constituted shoplifting under [s]ection 459.5." (*Id.* at p. 88.) Based on this reasoning, *Garrett* concluded that the use of a stolen credit card to purchase merchandise valued at \$950 or less constitutes shoplifting under section 459.5. (*Id.* at p. 90; see *Jimenez*, at p. \_ [p. \*7].)

Next, we discussed the Supreme Court’s decision in *Gonzales*. (*Jimenez, supra*, \_ Cal.App.5th at p. \_ [2018 Cal.App. LEXIS 410 at pp. \*\*7-9].) The defendant in *Gonzales* had entered a bank and cashed two checks valued at less than \$950 each. (*Gonzales, supra*, 2 Cal.5th at p. 862.) After pleading guilty to second degree burglary, Gonzales petitioned for misdemeanor resentencing under Proposition 47. (*Gonzales*, at p. 862.) The trial court denied his petition, the Court of Appeal affirmed, but the Supreme Court reversed. (*Ibid.*) The court concluded that the electorate “intended that the shoplifting statute apply to an entry to commit a nonlarcenous theft. *Thus, [Gonzales’s] act of entering a bank to cash a stolen check for less than \$950, traditionally regarded as a theft by false pretenses rather than larceny, now constitutes shoplifting under the statute.* [Gonzales] may properly petition for misdemeanor resentencing under . . . section 1170.18.” (*Ibid.*, italics added; see *Jimenez*, at p. \_ [p. \*7].)

The Supreme Court rejected the Attorney General’s argument that even if Gonzales did engage in shoplifting, he was ineligible for resentencing because he also entered the bank intending to commit felony identity theft under section 530.5, subdivision (a). (*Gonzales, supra*, 2 Cal.5th at p. 876.) The Attorney General claimed that Gonzales’s felony burglary conviction could have been based on his separate intent to commit felony identity theft. (*Ibid.*) Relying on *Garrett*, Gonzales responded that section 459.5 precluded such alternate charging. (*Gonzales*, at p. 876.) Agreeing that Gonzales “has the better view,” the Supreme Court determined that “[s]ection 459.5, subdivision (b) requires that any act of shoplifting ‘*shall be charged as shoplifting*’ and no one charged with shoplifting ‘may

also be charged with burglary or theft *of the same property.*' (Italics added.) A defendant must be charged only with shoplifting when the statute applies. It expressly prohibits alternate charging and ensures only misdemeanor treatment for the underlying described conduct." (*Ibid.*)

Finally, we noted the Supreme Court's view that obtaining a person's identifying information in the course of a theft is not excluded from Proposition 47 relief. (*Romanowski, supra*, 2 Cal.5th at pp. 913-914; see *Jimenez, supra*, \_ Cal.App.5th at p. \_ [pp. \*10-11].) Specifically, the court rejected the Attorney General's theory that the offense of theft of an access card (§ 484e) was enacted to protect consumers and thus should be exempt from the petty theft statute (§ 490.2) in Proposition 47. (*Romanowski*, at pp. 913-914.)

Just as *Romanowski* declined to exempt theft of an access card from the ambit of section 490.2, we rejected the People's request to exempt identity theft under section 530.5, subdivision (a) from the purview of shoplifting under section 459.5. (*Jimenez, supra*, \_ Cal.App.5th at p. \_ [2018 Cal.App. LEXIS 410 at p. \*11].) Noting that Jimenez's conduct was identical to Gonzales's conduct, we concluded they both committed "theft by false pretenses," which qualifies as shoplifting under section 459.5, subdivision (a). (*Jimenez*, at p. \_ [p. \*9].) As *Gonzales* clarified, "[a] defendant must be charged only with shoplifting when [section 459.5] applies." (*Gonzales, supra*, 2 Cal.5th at p. 876.)

The same rationale applies here. Chi's conduct is similar to Gonzales's conduct and nearly identical to Garrett's conduct. Chi entered three commercial establishments during business hours for the purpose of using a stolen credit card to

purchase merchandise valued at \$950 or less. (See *Garrett*, *supra*, 248 Cal.App.4th at p. 84.) In so doing, he committed “theft by false pretenses,” which “now constitutes shoplifting under [section 459.5, subdivision (a).]” (*Gonzales*, *supra*, 2 Cal.5th at pp. 862, 868-869 [shoplifting as defined in section 459.5, subdivision (a) encompasses all thefts, including theft by false pretenses]; *Garrett*, at p. 89 [“By using a stolen credit card, a thief must falsely represent that he or she is the proper owner of the credit card or has the consent of the owner to use it. Such conduct constitutes ‘theft by false pretenses’”].) Section 459.5, subdivision (b) makes it clear that “[a]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting,” and that “[n]o person who is charged with shoplifting may also be charged with burglary *or* theft of the same property.” (*Gonzales*, at p. 863, *italics added*.) The trial court properly concluded, therefore, that Chi’s acts of shoplifting could not be charged as felony identity theft under section 530.5, subdivision (a). (*Gonzales*, at p. 862; *Garrett*, at pp. 89-90.) Under section 495, subdivision (b), they could be charged only as misdemeanor shoplifting. (*Gonzales*, at pp. 862, 876-877; see 2 Couzens, Bigelow & Prickett, Sentencing Cal. Crimes (The Rutter Group 2017) § 25:4, p. 25-29 [“If section 459.5 applies, the defendant may not be alternatively charged with burglar[y] or identity theft”].)

In sum, we conclude the trial court properly granted Chi’s motion to dismiss the three felony identity theft counts. Chi met his burden of establishing that the charges qualified under Proposition 47 as misdemeanor shoplifting offenses.<sup>3</sup>

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<sup>3</sup> Because we agree with Chi that the trial court correctly granted his motion for the reasons stated in its ruling, we need

DISPOSITION

The order granting Chi's motion to dismiss the three felony identity theft charges (counts 1-3) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

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not reach Chi's alternative argument that each identity theft charge constituted petty theft under section 490.2.

Gilbert A. Romero, Judge  
Superior Court County of Ventura

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